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ABD RAHMAN SOLTAN & ORS v. FEDERAL LAND DEVELOPMENT AUTHORITY & ANOR AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
HADHARIAH SYED ISMAIL JCA
B WONG KIAN KHEONG JCA
[CIVIL APPEAL NOS: W-01(IM)(NCvC)-511-10-2020;
W-01(IM)(NCvC)-519-10-2020 & W-02(NCC)(A)-1265-09-2020]
12 MAY 2023

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Abstract – *The interpretation of a contract by a court is a finding of law by the court. In construing a contractual provision, an appellate court is in the same position as the court of first instance. The appellate court does not suffer any disadvantage in the interpretation of the contractual provision vis-à-vis the court of first instance. Further, in the construction of a contractual clause, the court could not consider the conduct of contracting parties which had taken place after the execution of the contract.*

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E ***CONTRACT:*** *Agreement – Development agreement – Clauses – Interpretation – Whether parties bound by article of development agreement by reason of memorandum of understanding – Effects of s. 9(5) of Arbitration Act 2005 ('AA') – Whether ss. 8, 9, 10 and 18 of AA applied to persons who were not parties to article in development agreement – Whether right to arbitrate waived – Whether arbitration commenced constituted abuse of arbitral process*

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G ***ARBITRATION:*** *Agreement – Development agreement – Clauses – Interpretation – Whether parties bound by article of development agreement by reason of memorandum of understanding – Effects of s. 9(5) of Arbitration Act 2005 ('AA') – Whether ss. 8, 9, 10 and 18 of AA applied to persons who were not parties to article in development agreement – Whether right to arbitrate waived – Whether arbitration commenced constituted abuse of arbitral process*

H Federal Land Development Authority ('FELDA') was the registered and beneficial owner of 24 lots of land along Jalan Semarak, Kuala Lumpur. Felda Investment Corporation Sdn Bhd ('FIC') had appointed Synergy Promenade Sdn Bhd ('SP') as the master developer of a proposed commercial development of FELDA's lands ('proposed project'). With regard to the proposed project, SP and FIC entered into a development agreement ('DA'). Annexed to the DA was a power of attorney ('PA') which was purportedly granted by FELDA for SP to deal with FELDA's lands for the purpose of the proposed project. On 2 December 2015, a sale and purchase agreement ('SPA') was concluded by FELDA and Synergy Promenade KLVC Sdn Bhd

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('SPKLVC') where FELDA sold one lot of FELDA's lands ('Lot 390') at a price of RM54,502,000. FELDA's execution of the SPA for Lot 390 was effected by SP's directors, *ie*, the first ('Rahman') and second ('Noraini') appellants by way of the PA. FELDA and SP then entered into a SPA wherein FELDA sold one lot of FELDA's lands, *ie*, Lot 29788, to SP for a sum of RM106,374,641.67. Once again, FELDA's execution of SPA was done by SP's directors, Rahman and Noraini, by way of the PA. FELDA, SP and SPKLVC entered into a memorandum of understanding ('MOU'). Titles to Lots 390 and 29778 had been re-registered in the name of FELDA. SP and SPKLVC filed an action ('Suit 795') against FELDA and the Director of Lands and Mines, Wilayah Persekutuan Kuala Lumpur ('PTG'), seeking (i) declarations that (a) SP was the lawful owner of Lot 29788; (b) SPKLVC was the lawful proprietor of Lot 390; (c) FELDA had no title, right and/or interest in Lots 390 and 29778; and (d) FELDA's titles' re-registration for Lots 390 and 29778 were invalid and *void ab initio*; and (ii) an order to compel PTG to reinstate the registration of the following titles: (a) SPKLVC should be restored as the registered owner of Lot 390; and (b) SP should be reinstated as the registered proprietor of Lot 29788; and (iii) an order for the court to assess damages which shall be paid by FELDA and PTG to SP and SPKLVC. Mohd Nazlan Mohd Ghazali J made the following decision, among others, in Suit 795: (i) the originating summons in Suit 795 shall be continued as if Suit 795 had been commenced by way of a writ; and (ii) Suit 795 shall be heard together with Suit 843. FIC only delivered vacant possession of Lot 390 in January 2016. In 2019, SP filed Suit 477 against FELDA and FIC for, among others, an order of specific performance of art. 9.04 of the DA, namely for FELDA and FIC to deliver vacant possession of the remaining 23 lots of FELDA lands to SP. Azimah Omar J dismissed SP's application for summary judgment against FELDA and FIC. FELDA and FIC filed Suit 843 against 21 defendants, pleading the following issues: (i) the DA had been executed without the approval of the Minister in Charge of FELDA; (ii) the illegality of the DA would invalidate, *inter alia*, the PA, the SPAs for Lots 390 and 29778 and the MOU; (iii) there was a commission of the tort of conspiracy to defraud or injure FELDA and FIC by, *inter alia*, causing the execution of the DA, PA and the SPAs for Lots 390 and 29778 ('first tort of conspiracy'); (iv) to conceal the first tort of conspiracy, there was a commission of a second tort of conspiracy by causing FELDA to enter into the MOU ('second tort of conspiracy'); and (v) there was a breach of fiduciary duties to FELDA and FIC. SP Group filed encl. 23 to stay Suit 843 pending the disposal of an arbitration commenced by SP against FIC ('arbitration'). Wong Chee Lin J dismissed encl. 23. FIC filed Suit 5 against SP, seeking: (i) a declaration that art. 9.04 was null and void, inoperative and/or incapable of being performed; (ii) a declaration that arbitration was null and/or void; (iii) a declaration that SP had waived its

right to refer any dispute or difference under the DA to arbitration; (iv) arbitration was an abuse of process; and (v) a 'permanent' injunction to restrain SP from continuing with the arbitration. Suit 5 was dismissed by Anand Ponnudurai JC. Hence, the present appeals against (i) the decision of Wong Chee Lin J in encl. 23 ('Appeal 511'); (ii) the decision of Wong Chee Lin J in Suit 843 ('Appeal 519'); and (iii) the decision of Anand Ponnudurai JC in Suit 5 ('Appeal 1265').

Held (dismissing Appeal Nos. 511 and 519; allowing Appeal No. 1265 in part)

Per Wong Kian Kheong JCA delivering the judgment of the court:

(1) All the eight clauses in the MOU had not referred to art. 9.04 and there was nothing in the MOU, either expressly or by necessary implication, which had provided for art. 9.04 to be part of the MOU within the meaning of s. 9(5) of the Arbitration Act 2005 ('AA'). It was to be noted that SP had not made FELDA a co-respondent (together with FIC) in the arbitration. Enclosure 23 and the consequent Appeal 511 affected the interest of all non-parties in art. 9.04, including FELDA. The SP Group could not rely on ss. 8, 9, 10 and 18 of the AA as well as a host of cases regarding those provisions to support Appeal 511 against the non-parties in art. 9.04, including FELDA. (paras 43 & 45)

(2) As the DA was a commercial agreement, art. 9.04 should be construed by the court in a manner which made business common sense. Applying the business common sense interpretation for commercial contract, art. 9.04 was construed as the first line of art. 9.04 had provided for the right of SP and FIC to apply to the court for specific performance of the DA. According to the second line of art. 9.04, SP and FIC had a right to arbitrate any dispute which may arise from the DA. If any party to the DA had first exercised: (i) the right to litigate the specific performance order, neither SP nor FIC could thereafter invoke the right to arbitrate; or (ii) the right to arbitrate, both SP and FIC could not then resort to the right to litigate the specific performance order. (para 51)

(3) In view of SP's waiver of art. 9.04, (i) SP could not proceed with the arbitration; (ii) SP could not apply in encl. 23 to stay Suit 843 pending the outcome of the arbitration; and (iii) Anand Ponnudurai JC and Wong Chee Lin J had committed errors in not deciding that there was SP's waiver of art. 9.04. Appeal 511 should be dismissed with costs. By virtue of s. 72 of the Courts of Judicature Act 1964, Wong Chee Lin J's second error in encl. 23 did not vitiate the validity of his decision in encl. 23. FELDA and FIC had filed a notice of cross appeal for the Court of Appeal to vary the grounds of Wong Chee Lin J's decision to include, *inter alia*, SP's waiver of art. 9.04. The cross appeal was allowed and Wong Chee Lin J's decision in encl. 23 was affirmed due to, among others, SP's waiver of art. 9.04. (para 60)

(4) The arbitration constituted an abuse of arbitral process which had caused detriment to FELDA and FIC as: (i) according to the second interpretation of art. 9.04, with the prior filing of Suit 477 by SP, SP should not have commenced and/or proceeded with the arbitration; (ii) the arbitration should not have been continued by SP in light of SP's waiver of art. 9.04; and (iii) with regard to same/similar issues, SP had caused a multiplicity of proceedings. (para 61)

(5) Anand Ponnudurai JC should have granted a perpetual injunction in this case as legal errors had been made with regard to the interpretation cl. 9.04. A perpetual injunction should be granted under s. 52(1) of the Specific Relief Act 1950 to restrain SP from breaching art. 9.04 when SP commenced and proceeded with the arbitration despite having previously filed Suit 477. (para 79)

Case(s) referred to:

Dato' Sri Mohd Najib Hj Abd Razak v. PP & Other Appeals (No 2) [2022] 8 CLJ 378 FC ***(refd)***

Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2023] 4 CLJ 343 CA ***(refd)***

Era Kemuncak Jaya (M) Sdn Bhd v. Tenaga Switchgear Sdn Bhd [2021] 1 LNS 1570 HC ***(refd)***

Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***

Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd & Ors [2019] 7 CLJ 395 FC ***(refd)***

LNH Landscaping Sdn Bhd v. TKH Construction Sdn Bhd & Other Appeals [2021] 1 LNS 581 HC ***(refd)***

Protasco Bhd v. Tey Por Yee & Another Appeal [2018] 5 CLJ 299 CA ***(refd)***

SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***

Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 HC ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 8, 9(5), 10, 18, 41A(1)(a), (1)(b)
Courts of Judicature Act 1964, ss. 69(1), 72
Land Development Act 1956, ss. 2, 3(2)(a), (b), (c), (d), (e), (3)(c)
Legal Profession (Practice and Etiquette) Rules 1978, rr. 6(a), 24(a), (b)
Rules of Court 2012, O. 15 r. 16, O. 29 r. 1(1), O. 35 r. 3, O. 92 r. 4
Rules of the Court of Appeal 1994, rr. 7(1), 22
Specific Relief Act 1950, ss. 41, 50, 51(2), 52(1)

(Civil Appeal Nos: W-01(IM)(NCvC)-511-10-2020 & W-01(IM)(NCvC)-519-10-2020)

For the appellants - Harpal Singh Grewal, Amrit Pal Singh, Ng Jun Wei & Rany Rao; M/s Amrit & Company

For the respondents - Kumar Kanagasingam, Mong Chung Seng, Wong Han Wey & Medha Ong Ann Ting; M/s Lee Hishammuddin Allen & Gledhill

(Civil Appeal No: W-02(NCC)(A)-1265-09-2020)

For the appellants - Kumar Kanagasingam, Mong Chung Seng, Wong Han Wey & Medha Ong Ann Ting; M/s Lee Hishammuddin Allen & Gledhill

For the respondents - Harpal Singh Grewal, Amrit Pal Singh, Ng Jun Wei & Rany Rao; M/s Amrit & Company

[Editor's note: For the High Court judgment, please see Federal Land Development Authority & Anor v. Tan Sri Hj Mohd Isa Dato' Hj Abdul Samad & Ors [2021] 10 CLJ 562 (overruled in part).]

Reported by Lina E

JUDGMENT

Wong Kian Kheong JCA:

Introduction

[1] This judgment concerns the following three appeals (three appeals):

(i) Civil Appeal No. W-01(IM)(NCvC)-511-10/2020 (Appeal 511) has been filed by Encik Abdul Rahman bin Soltan (Encik Rahman), Puan Noraini binti Soltan (Puan Noraini), Synergy Promenade Sdn Bhd (SP) and Synergy Promenade KLVC Sdn Bhd (SPKLVC) against Federal Land Development Authority (FELDA) and Felda Investment Corporation Sdn Bhd (FIC).

Encik Rahman and Puan Noraini are siblings who are the directors and shareholders of SP and SPKLVC. This judgment shall refer to SP, SPKLVC, Encik Rahman and Puan Noraini collectively as "SP Group".

Appeal 511 is lodged against a decision of Wong Chee Lin J (Wong J) in the High Court on 25 September 2020 (Wong J's decision (encl. 23)) which has, among others, dismissed with costs in the cause an application in court enclosure no. 23 by SP Group (encl. 23). Enclosure 23 had applied for a stay of Kuala Lumpur High Court (Civil Division) Suit No. WA-22NCvC-843-11/2019 (Suit 843) pending the disposal of an arbitration commenced by SP against FIC (arbitration (SP/FIC)) in the Asian International Arbitration Centre (AIAC);

(ii) SP Group has filed Civil Appeal No. W-01(IM)(NCvC)-519-10/2020 against FELDA and FIC (Appeal 519).

Appeal 519 concerns Wong J's decision on 25 September 2020 in Suit No. 843 which has allowed with costs in the cause an application in court enclosure no. 61 (encl. 61) by FELDA and FIC for an interim injunction to restrain SP, SP's directors, agents, servants and nominees from continuing with the arbitration (SP/FIC) (Wong J's decision (encl. 61)); and

(iii) Civil Appeal No. W-02(NCC)(A)-1265-09/2020 has been filed by FIC against SP (Appeal 1265) against a decision of Anand Ponnudurai JC (as he then was) (Anand JC) dated 7 September 2020 (Anand JC's decision) which has dismissed with costs in Kuala Lumpur High Court (Commercial Division) Originating Summons No. WA-24NCC(ARB)-5-01/2020 instituted by FIC against SP (Suit 5).

Background

[2] FELDA is a body established by the Land Development Act 1956 (LDA) and FIC is a wholly-owned subsidiary of FELDA.

[3] FELDA is the registered and beneficial owner of 24 lots of land along Jalan Semarak, Kuala Lumpur (FELDA's lands).

[4] By way of a "letter of award" dated 24 January 2014, FIC had appointed SP as the "master developer" of a proposed commercial development of FELDA's lands (proposed project).

[5] With regard to the proposed project, on 2 June 2014 SP and FIC entered into a "development agreement" (DA). The following articles in DA are relevant:

(i) article 6.04 DA has provided as follows:

6.04. Vacant possession

(a) *For the purpose of enabling The Master Developer [SP] to carry out the development of the said Project, FIC shall cause FELDA to deliver vacant possession of [FELDA's Lands] to [SP] and/or its nominee(s) within thirty (30) days from [DA].*

(b) *FIC hereby irrevocably confirms and will ensure that vacant possession shall not be revoked by FELDA prior to the completion of the said Project.*

(emphasis added); and

(ii) article 9.04 DA (art. 9.04) states as follows:

9.04. Breach

In the event of any of the parties herein breaching any of the terms, covenants and or undertakings of [DA] for any reason whatsoever, without prejudice to claims for loss or damage, The Master Developer [SP] or FIC, as the case may be, shall be entitled to apply to Court for the remedy of specific performance against the other. For avoidance of doubt, parties hereby agree that all dispute [sic] or difference [sic] whatsoever touching or concerning [DA] or its construction or effect of the rights, duties and liabilities of the parties under or by virtue of [DA] shall be final and binding upon the auspices of the Kuala Lumpur Regional Centre for Arbitration in accordance with the Rules of Arbitration of the Kuala Lumpur Regional Centre for Arbitration and shall be By a single arbitrator to be appointed by mutual agreement of the parties. If the parties are unable to agree upon an arbitrator within

A eight (8) days of receipt by any party of a notice to agree upon an arbitrator, the arbitrator shall be appointed by the president of the Kuala Lumpur Regional Centre for Arbitration. The arbitration shall be conducted in the English Language; the costs of such arbitration shall be decided by the arbitrator.

B The parties hereto agree that FIC shall be entitled to terminate [DA] in the event THE MASTER DEVELOPER fails and/or omits and/or neglects to complete the Said Project within ten (10) years from the date of the first Development Order and the land conversion to the category of land use of commercial, whichever is later. (emphasis added).

C **[6]** Annexed to the DA was a power of attorney dated 3 June 2014 (dated later than the date of DA) which was purportedly granted by FELDA for SP to deal with FELDA's lands for the purpose of the proposed project (PA).

[7] In respect of DA and PA, Messrs Yeap, Yong & Amy (Messrs YYA)
D acted for SP.

[8] On 2 December 2015, a sale and purchase agreement (SPA) was concluded by FELDA and SPKLVC wherein FELDA sold one lot of FELDA's lands (Lot 390) to SPKLVC at a price of RM54,502,000 (SPA (Lot 390)). FELDA's execution of the SPA (Lot 390) was effected by SP's
E directors (Encik Rahman and Puan Noraini) by way of the PA. Title to Lot 390 had been transferred from FELDA to SPKLVC on 21 July 2016.

[9] FELDA and SP entered into a SPA on 7 November 2016 wherein FELDA sold one lot of FELDA's lands (Lot 29788) to SP for a sum of RM106,374,641.67 (SPA (Lot 29778)). Once again, FELDA's execution of
F SPA (Lot 29778) was done by SP's directors (Encik Rahman and Puan Noraini) by way of the PA. The transfer of title to Lot 29778 from FELDA to SP was registered on 6 March 2017.

[10] SPA (Lot 390) and SPA (Lot 29778) (referred collectively in this
G judgment as the "2 SPAs (Lots 390 and 29778)") had been prepared by Messrs YYA.

[11] On 15 January 2018, FELDA, SP and SPKLVC entered into a "memorandum of understanding" (MOU). Clauses 3 and 6 MOU state as follows (in Malay):

H 3. *Bahawa FELDA dan [SP] mengesahkan bahawa [SP] adalah MASTER DEVELOPER bagi suatu projek pembangunan hartanah yang butir-butirnya terkandung didalam [sic] suatu perjanjian [DA] yang dimasuki diantara [sic] [SP] dan [FIC]... melibatkan hartanah yang dinyatakan didalam [sic] [DA]*;

6. *Bahawa sebagai balasan dan goodwill, FELDA bersetuju untuk [SP]*
I *meneruskan projek pembangunan berdasarkan terma dan syarat sebagaimana terkandung didalam [sic] [DA]; bagaimanpun kedua-dua pihak FELDA dan [SP]*

bersetuju atas semangat goodwill membuka ruang perundingan bagi membuat penambahbaikan keatas [sic] perlaksanaan [DA] untuk dan demi kepentingan dan kebaikan kedua-dua pihak dalam tempoh enam (6) bulan daripada [sic] tarikh [MOU] ini ditandatangani;

(emphasis added).

[12] On 8 March 2018, titles to Lots 390 and 29778 have been re-registered in the name of FELDA (FELDA's titles re-registration (Lots 390 and 29778)).

Litigation

Kuala Lumpur High Court (Civil Division) Originating Summons No. WA-24NCvC-795-04/2019 (Suit 795)

[13] SP and SPKLVC have filed Suit 795 on 12 April 2019 against FELDA and Director of Lands and Mines, Wilayah Persekutuan Kuala Lumpur (PTG). The following relief, among others, has been sought in Suit 795:

(i) declarations that:

(a) SP is the lawful owner of Lot 29788;

(b) SPKLVC is the lawful proprietor of Lot 390;

(c) FELDA has no title, right and/or interest in Lots 390 and 29778; and

(d) FELDA's titles re-registration (Lots 390 and 29778) are invalid and *void ab initio*;

(ii) an order to compel PTG to reinstate the registration of the following titles:

(a) SPKLVC should be restored as the registered owner of Lot 390; and

(b) SP should be reinstated as the registered proprietor of Lot 29788; and

(iii) an order for court to assess damages which shall be paid by FELDA and PTG to SP and SPKLVC.

[14] On 24 November 2021, Mohd Nazlan Mohd Ghazali J (as he then was) has made the following decision, among others, in Suit 795:

(i) the originating summons in Suit 795 shall be continued as if Suit 795 has been commenced by way of a writ; and

(ii) Suit 795 shall be heard together with Suit 843.

(Nazlan J's decision).

[15] SP and SPKLVC have appealed to the Court of Appeal against Nazlan J's decision (appeal (Nazlan J's decision)). At the time of the preparation of this judgment, the appeal (Nazlan J's decision) is still pending.

Suit 477

[16] FIC only delivered vacant possession of Lot 390 to SP in January 2016.

[17] On 9 July 2019, Suit 477 was filed by SP against FELDA and FIC for, among others, an order of specific performance of art. 6.04 DA, namely, for FELDA and FIC to deliver vacant possession of the remaining 23 lots of FELDA lands to SP.

[18] On 23 July 2020, Azimah Omar J (as she then was) has dismissed SP's application for summary judgment against FELDA and FIC (Azimah J's decision (dismissal of summary judgment application)). An appeal to the Court of Appeal has been filed by SP against Azimah J's decision (dismissal of summary judgment application) (appeal (Azimah J's dismissal of summary judgment application)).

[19] Azimah Omar J, on 24 November 21, allowed an application by FELDA and FIC to strike out Suit 477 (Azimah J's decision (striking out of Suit 477)). SP has lodged an appeal to the Court of Appeal regarding Azimah J's decision (striking out of Suit 477) (appeal (Azimah J's striking out of Suit 477)).

[20] When this judgment is written, both the appeal (Azimah J's dismissal of summary judgment application) and appeal (Azimah J's striking out of Suit 477) have yet to be decided by the Court of Appeal.

Suit 843

[21] FELDA and FIC have filed Suit 843 on 14 November 2019 against 21 defendants as follows:

(i) SP Group;

(ii) 12 individuals who previously held positions in FELDA and FIC (12 individuals);

(iii) four partners of Messrs YYA (partners (Messrs YYA)); and

(iv) PTG.

[22] In Suit 843, the statement of claim of FELDA and FIC has pleaded the following issues:

(i) the DA had been executed without the approval of the Minister in Charge of FELDA (Minister) as required by s. 3(3)(c) read with the definition of "Minister" in s. 2 LDA (illegality issue (DA)). At the time of execution of the DA and PA, the Minister was the Rt Hon Prime Minister, Dato' Seri Mohd Najib bin Tun Abdul Razak;

(ii) the illegality of DA would invalidate, among others, PA, two SPAs (lots 390 and 29778) and MOU (illegality issue (instrument/contracts));

(iii) SP Group, 12 individuals and partners (Messrs YYA) had committed a tort of conspiracy to defraud or injure FELDA and FIC by, among others, causing the execution of DA, PA and two SPAs (Lots 390 and 29778) (issue (first tort of conspiracy));

(iv) to conceal the first tort of conspiracy as stated in the above sub-para. (3), SP Group, 12 individuals and partners (Messrs YYA) had committed a second tort of conspiracy by causing FELDA to enter into the MOU (issue (second tort of conspiracy)); and

(v) the 12 Individuals had breached fiduciary duties owed by them to FELDA and FIC (issue (breach of 12 individuals' fiduciary duties)).

[23] Enclosure 23 had been filed by SP Group. This has led to Wong J's decision (encl. 23) and Appeal 511.

[24] FELDA and FIC have filed encl. 61. The consequent Wong J's decision (encl. 61) is the subject matter of Appeal 511.

Suit 5

[25] On 24 January 2020, FIC has filed Suit 5 against SP. FIC has applied for, among others, the following remedies against SP in Suit 5:

(i) a declaration that art. 9.04 is "null and void, inoperative and/or incapable of being performed" (prayer 1 (Suit 5));

(ii) a declaration that arbitration (SP/FIC) is "null and/or void" (prayer 2 (Suit 5));

(iii) a declaration that SP has waived its right to refer any dispute or difference under DA to arbitration (prayer 3 (Suit 5));

(iv) arbitration (SP/FIC) is an abuse of process (prayer 4 (Suit 5)); and

(v) a "permanent" injunction to restrain SP, SP's directors, agents, servants and nominees from continuing with the arbitration (SP/FIC) (prayer 5 (Suit 5)).

[26] Suit 5 was dismissed by way of Anand JC's decision and this led to Appeal 1265.

Arbitration (SP/FIC)

[27] Arbitration (SP/FIC) had been instituted on 25 November 2019 by SP against FIC pursuant to art. 9.04.

[28] AIAC has appointed Tan Sri Dato' Seri Dr James Foong Cheng Yuen (arbitrator) as the sole arbitrator in the arbitration (SP/FIC).

[29] FIC had applied to the arbitrator to stay the arbitration (SP/FIC) but this application was rejected by the arbitrator.

[30] Up to the online hearing date of these three appeals on 3 March 2023 (online hearing (three appeals)), the arbitrator had issued six "procedural orders".

Application To Adjourn Online Hearing (Three Appeals)

[31] Before the online hearing (three appeals), SP Group's solicitors, Messrs Amrit & Company (Messrs AC), had applied to adjourn the online hearing (three appeals) (Messrs AC's adjournment application) on the following grounds, among others:

(i) Dato' Seri Gopal Seri Ram, learned lead counsel for SP Group, had just passed away on 29 January 2023; and

(ii) SP Group had to appoint a learned lead counsel to conduct the three appeals.

[32] The solicitors for FELDA and FIC, Messrs Lee Hishammuddin Allen & Gledhill (Messrs LHAG), had objected to Messrs AC's adjournment application (Messrs LHAG's objection).

[33] In view of Messrs LHAG's objection, we have directed for the merits of Messrs AC's adjournment application to be submitted orally by learned lead counsel for all parties on the online hearing (three appeals).

[34] On the online hearing (three appeals):

(i) Dato' Harpal Singh Grewal appeared as the new learned lead counsel for SP Group;

(ii) Dato' Harpal orally applied to adjourn the three appeals on the following grounds:

(a) Dato' Harpal had just been retained on Friday, 24 February 2023, to act for SP Group in the three appeals;

(b) Dato' Harpal needed time to peruse the voluminous records of appeal and written submissions for the three appeals; and

(c) the Court of Appeal may give a "short adjournment" by adjourning the online hearing (three appeals) to the earliest possible date; and

(iii) learned lead counsel for FELDA and FIC, Mr Kumar Kanagasingam, reiterated Messrs LHAG's objection.

[35] Order 35 r. 3 of the Rules of Court 2012 (RC), s. 69(1) of the Courts of Judicature Act 1964 (CJA) and r. 7(1) of the Rules of the Court of Appeal 1994 (RCA) are reproduced below:

O. 35 r. 3 of the RC **Adjournment of trial**

Subject to the provisions of these Rules, **the Judge may, if he thinks it is expedient in the interest of justice, adjourn a trial not more than three times, unless the circumstances otherwise require, and upon such terms, if any, as he thinks fit**.

s. 69 of the CJA **Hearing of appeals**

(1) Appeals to the Court of Appeal shall be by way of rehearing, and **in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court**, together with full discretionary power to receive further evidence by oral examination in court or through a remote communication technology, by affidavit, or by deposition taken before an examiner or commissioner.

r. 7 of the RCA **Power of Court to amend, admit further evidence, or draw inferences of fact**

(1) **The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court**, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or Commissioner.

(emphasis added)

[36] The High Court has a discretion under O. 35 r. 3 of the RC to adjourn the hearing of a trial. By virtue of s. 69(1) of the CJA and r. 7(1) of the RCA, the Court of Appeal "shall have all the powers" of the High Court. Consequently, it is not disputed that the Court of Appeal has a discretionary power to adjourn the hearing of appeals under s. 69(1) of the CJA and r. 7(1) of the RCA read with O. 35 r. 3 of the RC.

[37] With regard to the exercise of an appellate court's power to adjourn the hearing of an appeal, we rely on the following 4-1 majority judgment of the Federal Court in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2023] 4 CLJ 343; [2023] 3 MLJ 40, para. 18 (CLJ); [135] and [136] (MLJ):

[135] *The law on adjournments is settled. It is this. The court has the absolute discretion in allowing or refusing an application for adjournment. The fact of the prosecution having not raised any objections to the applicant's counsel's application for adjournment is neither here nor there. The court is not bound to adjourn the hearing of a case as a matter of course merely because the other side has no objections. That the grant or refusal of an adjournment is an exercise of discretion of the court was clearly pronounced by this court in Halaman Perdana Sdn Bhd & Ors v. Tasik Bayangan Sdn Bhd* [2014] 3 CLJ 681; [2014] 4 MLJ 1:

> [21] As regards the prayer to set aside the first decision, we are of the view that it was obviously not within the ambit of r. 137. *The grant or refusal of an adjournment was entirely an exercise of discretion by the learned judges who heard the leave application.*

[136] *Of course, it goes without saying such discretion should be exercised judiciously. KJ Aiyar Judicial Dictionary (14th Ed) defined judicial discretion as follows*:

> *The judicial discretion is the discretion to know through the law what is just. It must be exercised with vigilance and circumspection according to justice, common sense, and sound judgment (Sarpanch Lonand Gram Panchayat v. Ramgiri Goswami* AIR 1968 SC 222) ...

The discretion which the court has to exercise is a judicial discretion. That discretion has to be exercised on well settled principles. Therefore, the court has to consider the nature of obligation in respect of which performance is sought, circumstances under which the decision came to be made, the conduct of parties, and the effect of the court granting the decree ... .

(emphasis added)

[38] We have decided to exercise our discretion to refuse to adjourn the online hearing (three appeals). Our reasons are as follows:

(i) Dato' Seri Gopal had previously appeared for SP Group in encl. 23, encl. 61 and Suit 5, the subject matter of the three appeals. Consequently, Messrs AC filed four detailed written submissions regarding the three appeals (four submissions (three appeals)) which presumably had been prepared in accordance with Dato' Seri Gopal's learned input (before the demise of Dato' Seri Gopal):

(a) two lengthy written submissions in support of Appeals 511 and 519 (totalling 140 pages); and

(b) two comprehensive written submissions to resist Appeal 1265 (totalling 87 pages).

As exhaustive four submissions (three appeals) have been filed on behalf of SP Group in these three appeals, this court cannot foresee any prejudice to SP Group by proceeding with the online hearing (three appeals);

(ii) Suit 795 has been commenced on 12 April 2019 while Suit 843 is filed on 14 November 2019. By reason of Nazlan J's decision, Suit 795 shall be heard together with Suit 843 (joint trial (Suits 795 and 843)). The joint trial (Suits 795 and 843) has been stayed by the High Court pending the disposal of these three appeals. If this court adjourns the online hearing (three appeals) upon Dato' Harpal's application, there will be a further delay in the joint trial (Suits 795 and 843);

(iii) as explained in sub-paras. 67(1) and (2) below, the joint trial (Suits 795 and 843) involves issues of law and/or fact which concern public interest and the effect of a socially benevolent legislation such as the LDA. It is in the public interest for the joint trial (Suits 795 and 843) to be disposed of expeditiously. Hence, any adjournment of the online hearing (three appeals) is contrary to public interest;

(iv) the three appeals were supposed to be heard on 29 April 2022 (first hearing date). However, by way of a letter dated 12 April 2022, Messrs AC had applied to adjourn the first hearing date on, among others, the ground that Dato' Seri Gopal had four Federal Court appeals (to be

heard together) on the first hearing date. The Court of Appeal had previously exercised its discretion to adjourn the first hearing date (adjournment (first hearing date)). In view of the adjournment (first hearing date) which gave more than ten months (from 29 April 2022 to 3 March 2023) for Dato' Seri Gopal to prepare the four submissions (three appeals), there is no reason for this court to adjourn the online hearing (three appeals);

(v) the online hearing (three appeals) was supposed to be heard on 4 July 2023. By way of a letter dated 14 December 2022, Messrs LHAG had applied to the learned President of the Court of Appeal (PCA) to bring forward the online hearing (three appeals). Consequently, the PCA exercised his powers under r. 22 of the RCA and brought forward the online hearing (three appeals) to 3 March 2023 (PCA's decision (r. 22 of the RCA)). Rule 22 of the RCA states as follows:

> r. 22. **Urgent appeals.**
>
> *Any party filing a notice of appeal may in the case of urgency apply in writing to the President who, if satisfied that it is a proper case for an urgent hearing, may order the appeal to be heard at such time convenient to the Court*. On such order the party applying shall file copies of the papers lodged in the High Court and his grounds of appeal.
>
> (emphasis added)

An adjournment of the online hearing (three appeals) will certainly defeat the purpose of PCA's decision (r. 22 of the RCA); and

(vi) Rules 6(a), 24(a) and (b) of the Legal Profession (Practice and Etiquette) Rules 1978 (LPR) provide as follows:

> *r. 6 An advocate and solicitor not to accept brief if unable to appear*
>
> *(a) An advocate and solicitor shall not accept any brief unless he is reasonably certain of being able to appear and represent the client on the required day.*
>
> ...
>
> *r. 24 Advocate and solicitor to be ready for the day fixed for trial*
>
> *(a) An advocate and solicitor shall make every effort to be ready for trial on the day fixed.*
>
> *(b) An advocate and solicitor may apply for postponement of a case fixed for hearing for good and cogent reasons only.*
>
> (emphasis added)

The effect of r. 6 of the LPR has been explained by a unanimous judgment of a five-member coram of the Federal Court in *Dato' Sri Mohd Najib Hj Abd Razak v. PP & Other Appeals (No 2)* [2022] 8 CLJ 378; [2022] MLJU 1938, at [18] to [20], as follows:

A [18] *In this regard, we find Rule 6(a) [LPR] most relevant ...*

[19] *Thus, where counsel has accepted a brief, he should be deemed as 'reasonably certain of being able to appear and represent the client on the required day'. [LPR] also appear to recognise the general disposition of the Courts in this country to disfavour adjournments unless cogent reasons are provided. The general rule is that*
B *counsel shall make every effort to be ready for trial (and we think by extension appeals) on the day fixed. See: Rule 24(a) and (b) [LPR].*

[20] *[LPR] are not, in a sense, binding on the courts. But they are nevertheless binding on members of the Bar who are obliged to comply with them. And, they are indicative of the fact that any disciplined lawyer such as the counsel for the appellant*
C *would not have accepted a brief with dates already fixed for hearing unless he was prepared.*

(emphasis added)

By reason of rr. 6(a) and 24(a) of the LPR, if any learned counsel was not ready to submit for any party during the online hearing (three appeals), he
D or she should not have accepted the brief to act for that party in the first place.

Court's Approach Regarding Three Appeals

[39] We have decided to hear Appeals 511 and 519 before hearing Appeal
E 1265. This is because firstly, the outcome of Appeals 511 and 519 will affect our decision in Appeal 1265. Secondly, if Appeal 1265 is heard first and if it is allowed by this court, this will render Appeals 511 and 519 redundant. In other words, if we proceed to hear first Appeal 1265 and if we allow Appeal 1265, this may cause an injustice to SP Group.

F **Issues**

[40] The following questions arise for our determination in these three appeals:

(i) with regard to Appeal 511:

G (a) whether FELDA is bound by art. 9.04 by reason of the MOU and the effect of s. 9(5) of the Arbitration Act 2005 (AA);

(b) do ss. 8, 9, 10 and 18 of the AA apply to persons who are not parties to art. 9.04 (Non-Parties (art. 9.04))?;

H (c) regarding the interpretation of art. 9.04:

(1) should art. 9.04 be construed in a manner which makes business common sense?; and

(2) whether court can apply the *contra proferentem rule* to interpret
I art. 9.04;

(d) whether SP had waived its right to arbitrate under art. 9.04 (SP's waiver (art. 9.04)) when:

(1) SP refused to apply to Azimah J to stay Suit 477 pending the outcome of arbitration (SP/FIC) after the amended defence of FELDA and FIC (amended defence (Suit 477)) had pleaded, among others:

(i)(a) Illegality Issue (DA); and

(i)(b) Issue (first Tort of Conspiracy);

(2) SP applied for summary judgment against FELDA and FIC; and

(3) SP filed appeal (Azimah J's dismissal of summary judgment application);

(e) in view of, among others, SP's waiver (art. 9.04), did arbitration (SP/FIC) constitute an abuse of arbitral process?; and

(f) if there was no SP's waiver (art. 9.04), whether the High Court should have exercised its discretion under O. 92 r. 4 of the RC, the court's inherent jurisdiction and/or inherent power to:

(1) proceed with Suit 843 despite the commencement of the arbitration (SP/FIC); or

(2) stay Suit 843 pending the outcome of the arbitration (SP/FIC);

(ii) in respect of appeal 519, did Wong J err in the exercise of her discretion to grant an interim injunction to restrain SP from continuing with the arbitration (SP/FIC) pending the disposal of Suit 843?; and

(iii) regarding Appeal 1265, whether there should be appellate intervention regarding Anand JC's decision.

Appeal 511

[41] In support of Appeal 511, SP Group has relied on ss. 8, 9, 10 and 18 of the AA which state as follows:

s. 8. Extent of court intervention

No court shall intervene in matters governed by this Act, except where so provided in this Act.

9 *Definition and form of arbitration agreement*:

(1) *In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*

(2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing:

A (a) if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means; or

(b) if it is contained in an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

B

(4A) The requirement that an arbitration agreement be in writing is met by any electronic communication that the parties make by means of data message if the information contained therein is accessible so as to be useable for subsequent reference.

C (5) *A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.*

(6) For the purpose of this section, "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy.

D

s. 10 Arbitration agreement and substantive claim before court

(1) *A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

E

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

F (2A) Where admiralty proceedings are stayed pursuant to subsection (1), the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest:

(a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute; or

G

(b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

H (2B) Subject to any rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order under subsection (2A) as would apply if it were held for the purposes of proceedings in the court making the order.

(2C) For the purpose of this section, admiralty proceedings refer to admiralty proceedings under Order 70 of the *Rules of the High Court 1980 and proceedings commenced pursuant to paragraph 24(b) [CJA].

I

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

(4) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia.

s. 18 Competence of arbitral tribunal to rule on its jurisdiction

(1) *The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement*.

(2) For the purposes of subsection (1):

(a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and

(b) a decision by the arbitral tribunal that the agreement is null and void shall not ipso jure entail the invalidity of the arbitration clause.

(3) *A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence*.

(4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.

(5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.

(7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.

(8) Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of that ruling appeal to the High Court to decide the matter.

(9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

(10) No appeal shall lie against the decision of the High Court under subsection (8). (emphasis added).

Is FELDA Bound By Article 9.04?

[42] Wong J's decision (encl. 23), at [62] and [63], has decided as follows:

[62] *The 5th to 8th Defendants submit that FELDA is boundby the Dispute Resolution Clause (art. 9.04 of DA) by virtue of the MOU dated 15 January 2018. Section 9(5) [AA] provides that*:

...

A [63] *However, I cannot accept that contention of the said Defendants. The reference to the other document containing an arbitration clause must be such as to make that arbitration clause part of the agreement. In this case, there is nothing to show that the terms and conditions of the development agreement have been incorporated as part of the terms and conditions of the MOU or that FELDA has agreed to arbitrate. I do not accept that the arbitration agreement in the development agreement has been* B *incorporated as part of the MOU. Accordingly, FELDA is a non-party and I have no jurisdiction to stay the proceedings commenced by FELDA*.

(emphasis added)

[43] We accept the above part of Wong J's decision (encl. 23) due to the C following reasons:

(i) all the eight clauses in the MOU have not referred to art. 9.04; and

(ii) there is nothing in the MOU, either expressly or by necessary implication, which has provided for art. 9.04 to be part of the MOU within the meaning of s. 9(5) of the AA.

D

It is to be noted SP has not made FELDA a co-respondent (together with FIC) in the arbitration (SP/FIC).

Whether Article 9.04 And AA Apply To Non-Parties (Article 9.04)

E **[44]** In the Court of Appeal case of *Protasco Bhd v. Tey Por Yee & Another Appeal* [2018] 5 CLJ 299, at [6], Nallini Pathmanathan JCA (as she then was) has decided as follows:

[6] *The crux of these appeals turns on the law governing a stay of proceedings in relation to non-parties to an arbitration agreement. In the instant case, only Protasco* F *and PT ASU are bound by the arbitration agreement. The other two defendants are not so bound. They fall outside the scope of the agreement …*

(emphasis added)

The above decision in *Protasco* has been affirmed by Idrus Harun FCJ in the Federal Court in *Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd & Ors* G [2019] 7 CLJ 395; [2019] 5 MLJ 1, at [74] and [91], as follows:

[74] *In its decision, the Court of Appeal in Protasco, held that s. 10 [AA] was inapplicable and did not come into play as the second and third defendants were non-parties to the arbitration agreement. The court's power to grant a stay is derived from its inherent power to stay court proceedings pending arbitration in the interests* H *of the justice of the case. The decision in Protasco is instructive and the finding it made that s. 10 [AA] is inapplicable to the third parties accords well with our decision in this appeal*.

...

[91] *The language of [AA] in particular ss. 8 and 10 is clear and unambiguous.* I *It does not apply to the third party such as the appellant. … When [AA] does not apply to a non-party to arbitral proceedings, a logical proposition that follows is that it would be manifestly wrong to extend its policy to the said non-party …*

(emphasis added)

[45] As explained in the above para. 43, FELDA is not bound by art. 9.04. Enclosure 23 and the consequent Appeal 511 affect the interest of all non-parties (art. 9.04), including FELDA. In view of the above appellate decisions in *Protasco* and *Jaya Sudhir*, SP Group cannot rely on ss. 8, 9, 10 and 18 of the AA as well as a host of cases regarding those provisions, to support Appeal 511 against non-parties (art. 9.04) (including FELDA).

Interpretation Of Article 9.04

[46] In Suit 5, at [17] to [22], [24] and [25], Anand JC construed art. 9.04 as follows:

> **Issue 1: Is Article 9.04 Pathological, Unclear And Null And Void?**
>
> [17] In light of prayer 1 wherein the Plaintiff is seeking a declaration that art. 9.04 null and void, I think it best to deal with this first. On this issue, the Plaintiff contends that on a reading of the said Article, the same does not provide any clear or unequivocal intention on the part of the parties to refer disputes under the DA to arbitration. Alternatively, the Plaintiff submits that even if such intention is there, such clause is ambiguous and uncertain to the extent of being meaningless due to the fact that it also provides the parties the right to seek remedies from court.
>
> [18] *In my considered view, whilst art. 9.04 may not be drafted in the best of terms, I don't find the clause pathological or unclear. Obviously, there are two limbs. In the first sentence, it clearly provides that in the event there is a breach, either party shall be entitled to apply to court for the remedy of specific performance.*
>
> [19] *The second sentence of art. 9.04, then provides that all disputes touching or concerning the agreement etc. shall be final and binding upon the auspices of the KLRCA to be decided by a single arbitrator to be appointed by mutual consent.*
>
> [20] *In my view, the intention of the parties was clear. If there was a breach and in the event a party wanted only a remedy of specific performance, it was entitled to apply to court for such relief. That is exactly what SPSB did in Suit 477. SPSB in Suit 477 ("as the Plaintiff there") sought an order for specific performance of Clause 6.04 to deliver vacant possession of the 23 lots of land and nothing more.*
>
> [21] *The Plaintiff contends that having filed Suit 477 for specific performance and having made a choice to go to court, then, all subsequent matters/disputes would also have to be ventilated in court as well. With respect, I find no merit in such a contention as that would stultify the second line of art. 9.04.*
>
> [22] *In my view, a reading of art. 9.04 clearly reveals the intent of the parties that if there was a claim purely for specific performance, a party was entitled to go to court. If there were other dispute and differences or where damages was to be claimed, it was clearly the intention that such disputes were to be decided by a single arbitrator under the auspices of the KLRCA.*
>
> ...

A [24] *... On the facts of this case, in my view, there was an arbitration Agreement as highlighted above with the clear intention of the parties to refer disputes to arbitration. Further, I do not find the two sentences in art. 9.04 inconsistent or irreconcilable.*

[25] *Additionally, I believe that the intent of the parties in art. 9.04 is also manifested*
B *by the conduct of SPSB in Suit 477 ...* (emphasis added)

[47] According to Anand JC's construction of art. 9.04, SP was entitled to file Suit 477 as well as to commence arbitration (SP/FIC) thereafter. This judgment shall refer to Anand JC's construction of art. 9.04 as the "first interpretation (art. 9.04)". The first interpretation (art. 9.04) has been
C accepted in Wong J's decision (encl. 23), at [50], as follows:

[50] *In any event, the court in Suit 5 has recently dismissed the application by FIC for a permanent injunction to restrain the arbitration proceedings and in doing so the court has refused to declare that the arbitration agreement is null and void, inoperative and/or incapable of being performed. I am in agreement with the ruling*
D *of the court in Suit 5.* (emphasis added)

[48] Firstly, the interpretation of a contract by a court is a finding of law by the court – please refer to the Federal Court's judgment delivered by Jeffrey Tan FCJ in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693; [2018] 1 MLJ
E 1, at [125] and (150(a)). In construing a contractual provision, an appellate court is in the same position as the court of first instance and the appellate court does not suffer any disadvantage in the interpretation of the contractual provision (*vis-a-vis* the court of first instance).

[49] Secondly, in the construction of a contractual clause, the court cannot
F consider the conduct of contracting parties which has taken place after the execution of the contract. In *Era Kemuncak Jaya (M) Sdn Bhd v. Tenaga Switchgear Sdn Bhd* [2021] 1 LNS 1570; [2022] 1 MLRH 208, at [29], the High Court has decided as follows:

G [29] In this case, the Plaintiff and Defendant had reduced the Agreement in a "complete written form". The Agreement is not a contract which is partly in writing and partly by way of conduct. Based on ss. 91 and 92 [Evidence Act 1950], the Defendant cannot rely on extrinsic evidence, including the conduct of the Plaintiff and Defendant (Parties' Conduct), to add TNB's Schedule (Civil Works) to the Agreement. *There is another*
H *reason why I cannot refer to the Parties' Conduct in the interpretation of clause 1.2(a) to (d) LA. I cite the judgment of Lord Reid in the House of Lords in James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, at 603, as follows:

I must say that I had thought that it is now well settled that it is not
I *legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.*

Lord Reid affirmed the above decision in the House of Lords' case of Schuler AG v. Wickman Machine Tool Sales Ltd [1974] AC 235, at 252, *as follows*:

> *I must add some observations about a matter which was fully argued before your Lordships. The majority of the Court of Appeal were influenced by a consideration of actings subsequent to the making of the contract. In my view, this was inconsistent with the decision of this House in Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] AC 583. *We were asked by the respondent to reconsider that decision on this point and I have done so. As a result I see no reason to change the view which I expressed in that case*. It was decided in *Watcham v. Attorney-General of East Africa Protectorate* [1919] AC 533 that in deciding the scope of an ambiguous title to land it was proper to have regard to subsequent actings and there are other authorities for that view. There may be special reasons for construing a title to land in light of subsequent possession had under it but I find it unnecessary to consider that question. *Otherwise I find no substantial support in the authorities for any general principle permitting subsequent actings of the parties to a contract to be used as throwing light on its meaning. I would therefore reserve my opinion with regard to Watcham's case but repeat my view expressed in Whitworth with regard to the general principle*.
>
> *If I have accepted the above submission by Mr. See, this will unlawfully allow contracting parties to evade their contractual obligations by acting contrary to the contracts and then unjustly rely on their unlawful conduct to interpret the contracts in their favour. Such an outcome is tantamount to a rewriting of the contract which is contrary to the sanctity of agreements*. (emphasis added)

Based on the above reasons, when Anand JC decided that the "intent of the parties in art. 9.04 is also manifested by the conduct of [SP] in Suit 477", with respect, this is a legal error in the interpretation of art. 9.04 because SP's conduct in Suit 477 (after the execution of the DA) has no bearing on the construction of art. 9.04 (first legal error (Anand JC's decision)).

[50] As the DA is a commercial agreement, art. 9.04 should be construed by the court in a manner which makes business common sense (business common sense interpretation (commercial contract)). The application of the business common sense interpretation (commercial contract) is demonstrated in the following judgment of the Federal Court delivered by Zainun Ali FCJ in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2016] 1 MLJ 464, at [68] (CLJ); [78] (MLJ):

> [78] *Thus the nub of this appeal is, when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear. It is noteworthy that the same approach was taken by Lord Hodge (in the majority decision of Arnold v. Britton), where His Lordship accepted the unitary process of construction in Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 para 21 that:

A *… if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.* (emphasis added)

[51] Applying the business common sense interpretation (commercial contract), we construe art. 9.04 as follows:

B (i) the first line of art. 9.04 has provided for the right of SP and FIC to apply to court for specific performance of DA (right to litigate (specific performance order)). According to the second line of art. 9.04, SP and FIC have a right to arbitrate any dispute which may arise from the DA (right to arbitrate);

C (ii) if any party to the DA has first exercised:

(a) the right to litigate (specific performance order), neither SP nor FIC can thereafter invoke the right to arbitrate; or

D (b) the right to arbitrate, both SP and FIC cannot then resort to the right to litigate (specific performance order)

(second interpretation (art. 9.04)); and

(iii) the second interpretation (art. 9.04) is supported by the following reasons:

E (a) upon the first exercise of the right to litigate (specific performance order) or the right to arbitrate (whichever is earlier), neither SP nor FIC can thereafter commence and proceed simultaneously with both litigation and arbitration regarding the DA. This is because issues which may arise in court with regard to the right to litigate (specific F performance order) may be the same or similar to the questions to be decided in the arbitration (SP/FIC) (same/similar issues). There is therefore a risk that the court and arbitral tribunal may reach conflicting decisions with regard to the same/similar issues (risk (conflicting court decision/arbitral award)). Parties in a commercial G transaction, such as SP and FIC, would not have manifestly intended for a risk (conflicting court decision/arbitral award) to arise from art. 9.04; and

H (b) both SP and FIC, as prudent parties in a commercial contract such as DA, do not intend to waste valuable time, legal expenses and efforts to conduct both litigation and arbitration (SP/FIC) concurrently. In other words, it does not make business common sense for SP and FIC to institute and prosecute litigation and arbitration simultaneously in respect of the same/similar issues.

I **[52]** There is another reason to support the second interpretation (art. 9.04). DA, including art. 9.04, is drafted by SP's solicitors, Messrs YYA. In accordance with the *contra proferentem* rule of construction, if there

is any ambiguity in art. 9.04, the ambiguity should be resolved in favour of FIC against SP (who has drafted the DA). Accordingly, as there are the first interpretation (art. 9.04) and second interpretation (art. 9.04), an application of the *contra proferentem* rule of interpretation supports this court's acceptance of the second interpretation (art. 9.04).

[53] It is to be noted that:

(i) SP has instituted Suit 477 on 9 July 2019 against FELDA and FIC;

(ii) Suit 477 is an exercise of SP's right to litigate (specific performance order) under art. 9.04; and

(iii) Suit 477 has been filed before the commencement of arbitration (SP/FIC) on 25 November 2019.

Premised on the second interpretation (art. 9.04) (please refer to the above paras. 50 to 52), as Suit 477 has already been instituted before the commencement of arbitration (SP/FIC):

(i) SP cannot exercise the right to arbitrate under art. 9.04; and

(ii) both Anand JC and Wong J, with respect, have erred in the interpretation of art. 9.04. This judgment shall refer to:

(a) Anand JC's legal error in the construction of art. 9.04 as the "second legal error (Anand JC's decision)"; and

(b) Wong J's legal error in the interpretation of art. 9.04 as the "Wong J's first legal error (encl. 23)".

[54] For the sake of completeness, by virtue of s. 72 of the CJA, Wong J's first legal error (encl. 23) does not affect the merits of Wong J's decision (encl. 23). According to s. 72 of the CJA:

> s. 72 **Immaterial errors**
>
> **No** judgment or **order of the High Court, or of any Judge, shall be reversed or substantially varied on appeal**, nor a new trial ordered by the Court of Appeal, **on account of any error, defect, or irregularity, whether in the decision or otherwise not affecting the merits or the jurisdiction of the court**. (emphasis added)

Whether There Was SP's Waiver (art. 9.04)

[55] This court will now assume that the first interpretation (art. 9.04) applies, namely:

(i) the right to litigate (specific performance order) is distinct from the right to arbitrate; and

(ii) SP has a right to file and proceed with Suit 477 and arbitration (SP/FIC) concurrently.

[56] Both Anand JC and Wong J had decided that there was no SP's waiver (art. 9.04). The relevant passages of Anand JC's decision and Wong J's decision (encl. 23) are reproduced below:

(i) according to Anand JC's decision, at [26] to [30]:

[26] *As seen earlier, in Suit 477, SPSB herein ("as the Plaintiff there") was merely seeking specific performance of article 6.04. In my view, based on the first sentence of art. 9.04, the Defendant was clearly entitled to do so. It is not disputed that in defending Suit 477, the Plaintiff herein had contended and taken the position that the DA was null and void and unenforceable.*

[27] *Having taken that position in Suit 477, the Plaintiff herein contends that SPSB should have then immediately taken steps to stay the suit and refer the same to arbitration as opposed to proceeding with the Summary Judgment application which was subsequently unsuccessful.*

[28] *However, having undertaken the exercise of perusing through the cause papers in Suit 477, I do not agree that SPSB have waived their rights to go to arbitration. In this regard, I would refer to the affidavits exchanged in SPSB's Order 14 application in Suit 477. In particular, I would refer to Enclosure 12 Jilid 10 which was SPSB's averment at paragraphs 41 and 42 in its Affidavit in Reply to the FIG's averments on the issue of validity of the DA whereby SPSB at page 3458 averred as follows*:

> 41. Further or alternatively, without prejudice to the matters raised above, I am advised by the Plaintiff's solicitors and verily believe that the allegations raised in the paragraphs 12 to 30 of the Defendants' Affidavit in Reply are clearly matters which touch or concern the DA or its construction or effect of the rights, duties and liabilities of the parties therein.
>
> 42. *As such, these allegations are clearly the subject matter for arbitration, pursuant to art. 9.04 of the DA. Therefore, there allegations are wholly irrelevant to the Plaintiff's claim herein for the remedy of specific performance.*

[29] *Furthermore, it is pertinent to note that in SPSB's Notice for arbitration, it seeks a declaration that the DA is valid and binding and for FIC to comply with all other obligations EXCEPT the performance of Articles 6.04 which was being sought in Suit 477 or in lieu thereof damages. Further, in paragraph 60(c) of the Statement of Case in the Arbitration Proceedings, SPSB claimed damages in addition to specific performance.*

[30] *Hence, I find no merit in the Plaintiff's contention that the Defendant has waived its right to arbitration."; and*

(ii) it is decided in Wong J's decision (encl. 23), at [53] to [55], as follows:

[53] *In the present case, there is no dispute that the relevant Defendants have not taken any steps in this proceeding. However, the Plaintiffs submit that SPSB has taken various steps in Suit 795 and Suit 477. SPAB has actively participated in Suit 795 by filing affidavits, actively participated in Suit 477 by filing affidavits and submissions and continue to prosecute the 2 suits until today. That is not in dispute.*

[54] *However Suit 795 is not a dispute under the development agreement and does not come within the ambit of the Dispute Resolution Clause.*

[55] *As for Suit 477, the first limb of art. 9.04 of the development agreement gives a party the option of going to court for specific performance of the development agreement and the Court in Suit 5 has decided that SPSB did not waive the arbitration agreement by commencing Suit 477. By the same token, SPSB cannot be taken to have waived the arbitration agreement by virtue of steps taken in Suit 477. This issue has already been decided in Suit 5 and I see no reason to differ from the decision of the learned JC in Suit 5. I am therefore of the view that SPSB has not waived its right to go to arbitration.* (emphasis added)

[57] Waiver of a right, interest or entitlement has been explained by Edgard Joseph Jr SCJ in the High Court case of *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476; [1993] 3 MLJ 633, at 654, as follows:

Now, what do waiver and acquiescence mean?

By definition, waiver is the abandonment of a right and is either express or implied; it may be implied from conduct which is inconsistent with the continuation of the right (Keene v. Biscoe 6 at p 203). A person who is entitled to the benefit of a stipulation in a contract may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver in this sense, depends upon consent (Selwyn v. Garfit 7), and the fact that the other party had acted upon it is sufficient consideration (Re Stokoe, ex p Moore 8). (emphasis added)

[58] As explained in *Tan Ah Chim*, any contractual right, including the right to arbitrate pursuant to art. 9.04, may be waived by SP or FIC.

[59] On the assumption that the first interpretation (art. 9.04) applies in this case, we are of the considered view that the following evidence and reasons support SP's waiver (art. 9.04):

(i) the amended defence (Suit 477) has pleaded, among others:

(a) illegality issue (DA); and

(b) issue (first tort of conspiracy).

In view of the amended defence (Suit 477), SP should have applied to Azimah J pursuant to O. 92 r. 4 of the RC, court's inherent jurisdiction and/or inherent powers for a stay of Suit 477 pending the outcome of the arbitration (SP/FIC) (along the lines of the application by SP Group in encl. 23 in Suit 843);

(ii) SP abandoned the right to arbitrate under art. 9.04 when SP applied for summary judgment against FELDA and FIC in Suit 477; and

(iii) SP confirmed the relinquishment of its right to arbitrate pursuant to art. 9.04 when SP filed appeal (Azimah J's dismissal of summary judgment application).

[60] In view of SP's waiver (art. 9.04):

(i) SP cannot proceed with arbitration (SP/FIC);

(ii) SP cannot apply in encl. 23 to stay Suit 843 pending the outcome of arbitration (SP/FIC);

(iii) with respect, Anand JC and Wong J had committed errors in not deciding that there was SP's waiver (art. 9.04). This judgment shall refer to:

(a) Anand JC's error with regard to SP's waiver (art. 9.04) as the "third error (Anand JC's decision)"; and

(b) Wong J's error in respect of SP's waiver (art. 9.04) as the "Wong J's second error (encl. 23)";

(iv) Appeal 511 should be dismissed with costs. By virtue of s. 72 of the CJA, Wong J's second error (encl. 23) does not vitiate the validity of Wong J's decision (encl. 23); and

(v) FELDA and FIC have filed a notice of cross-appeal for the Court of Appeal to vary the grounds of Wong J's decision (encl. 23) to include, among others, SP's waiver (art. 9.04) (cross-appeal (FELDA/FIC)). Accordingly, we allowed the cross-appeal (FELDA/FIC) and affirmed Wong J's decision (encl. 23) due to, among others, SP's waiver (art. 9.04).

Did Arbitration (SP/FIC) Constitute An Abuse Of Arbitral Process?

[61] It is our decision that the arbitration (SP/FIC) constitutes an abuse of arbitral process which has caused detriment to FELDA and FIC. Our reasons are as follows:

(i) according to the second interpretation (art. 9.04), with the prior filing of Suit 477 by SP, SP should not have commenced and/or proceeded with the arbitration (SP/FIC): please refer to the above paras. 50 to 53;

(ii) as explained in the above paras. 57 to 60, the arbitration (SP/FIC) should not have been continued by SP in light of SP's waiver (art. 9.04);

(iii) with regard to the same/similar issues, SP has caused a multiplicity of proceedings as follows:

(a) appeal (Azimah J's dismissal of summary judgment application);

(b) appeal (Azimah J's striking out of Suit 477); and

(c) arbitration (SP/FIC)

(multiplicity (litigation/arbitration)); and

(iv) due to the multiplicity (litigation/arbitration):

(a) there is a risk that:

(1) any award which may be made by the arbitrator in the arbitration (SP/FIC);

(2) the decision of the Court of Appeal in the appeal (Azimah J's dismissal of summary judgment application); and

(3) the Court of Appeal's determination of the appeal (Azimah J's striking out application) may be in conflict with each other regarding, among others, illegality issue (DA) and issue (first tort of conspiracy); and

(b) a lot of time, legal expense and effort may be unnecessarily expended by SP, FELDA and FIC in the prosecution of the multiplicity (litigation/arbitration).

Should Court Stay Suit 843 Pending Disposal Of Arbitration (SP/FIC)?

[62] We will now assume that there is no SP's waiver (art. 9.04). With regard to encl. 23, the question was whether Wong J should have exercised her discretion to:

(i) stay Suit 843 pending the outcome of the arbitration (SP/FIC) as applied for by SP Group in encl. 23 (first option); or

(ii) proceed with Suit 843 despite the commencement of the arbitration (SP/FIC) (second option).

This judgment shall refer to the first option and second option collectively as the "two options".

[63] The second option was chosen in Wong J's decision (encl. 23), at [56], [58], [59] and [64], as follows:

> [56] *It appears that so far as it relates to the claim by FIC against SPSB, I have no choice but to order a stay of the court proceedings pending arbitration. I have re-considered whether, in view of the mandatory provision in section 10 [AA] and the various cases which have highlighted the lack of any discretion left to the court not to grant a stay where the conditions in section 10 have been complied with, I have any discretion not to stay the court proceedings between FIC and SPSB pending arbitration. I note that in the case of Jaya Sudhir a/l Jayaram v. Nautical Supreme Sdn Bhd & Ors [2019] 7 CLJ 395; [2019] 5 MLJ 1 the Federal Court did expressly say this*:
>
> > [60] ... *We accept that courts may decline to give effect to the exclusive jurisdiction clause or arbitration clause where interest of third parties are involved or where there is a risk of parallel proceedings and inconsistent decisions arising out of the conduct of an arbitration*.

A

[61] *Furthermore, once a duplication between two proceedings is identified it immediately becomes relevant for the court to consider an intersection of two powerful considerations and these are firstly, the desire of courts to hold commercial parties to their bargain and secondly, the desire of courts to avoid disruption and multiplicity or duplicity of litigation, in particular to avoid parallel proceedings and the risk of inconsistent findings, as well as to avoid the causing of inconvenience to third parties (Incitec Ltd v. Alkimos Shipping Corp* [2004] FCA 698 at pp 12 and 13).

B

...

[58] *In the present case, there are clearly a duplicity of issues and the risk of inconsistent decisions. In both the court proceedings and the arbitration proceedings, the validity of the [DA] is being challenged. The Plaintiffs submit that the legality of the [DA] is properly raised by FELDA as opposed to FIC. FELDA is a statutory body and pursuant to the LDA, the approval of the Minister in charge of FELDA is required before FELDA's agent FIC can enter into the [DA] with SPSB. As such, it is open to FELDA to challenge the legality of the [DA] in court proceedings in any event, even if the proceedings between FIC and SPSB were to be stayed. In that event, there is obviously a risk of duplicity and inconsistent decisions if both the court proceedings and arbitration proceedings were to proceed concurrently. On the issue of conspiracy too there will be a duplicity and risk of inconsistent decisions. In view of the Federal Court decision in Jaya Sudhir, it appears that I have a discretion not to enforce the arbitration clause since the interests of third parties are involved and there is a risk of parallel proceedings and inconsistent decisions.*

C

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E

[59] *In any event, since I am of the view, for the reasons stated in the related grounds of judgment, that I should grant an anti-arbitration injunction in this case, it makes sense to dismiss the stay application. The Plaintiffs submit that the decision for En 23 and En 61 which is the Plaintiffs' application to restrain the arbitration proceedings pending the court action, must be diametric. It would be a travesty if I were to allow or dismiss both applications. Either the stay pending arbitration is allowed or the anti-arbitration injunction is dismissed or the stay application is dismissed and the anti-arbitration injunction allowed. A similar situation arose in Lin Ming v. Chen Shu Quen [2012] 2 HKLRD 547 where the Hong Kong High Court was faced with a stay and also an injunction application by the opposing parties. The court took the position that common sense dictates that the court could only adopt one or the other course but not both. Since I am of the view that an anti-arbitration injunction ought to be granted in En 61, accordingly, the stay application is dismissed with costs. However, I would like to point out that even if I were to have no choice but to stay the claims between FIC and SPSB in court pending arbitration, I would still have allowed the anti-arbitration injunction sought in Enclosure 61.*

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...

[64] *As for the 5th and 6th Defendants and SPKLVC, they are not parties to any arbitration agreement. Although they have sought for an order to stay the court proceedings against them pending arbitration under the inherent jurisdiction of the court, they have not shown any authority whereby I can grant the order sought in relation to non-parties to the arbitration agreement when FIC and FELDA refuse to arbitrate their disputes. Accordingly I would dismiss this application.*

I

(emphasis added)

[64] Order 92 r. 4 of the RC states as follows: A

Inherent powers of the court

For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. B

(emphasis added)

[65] As to which of the two options should have been adopted by the court in encl. 23, it is decided in *Protasco*, at [49], [51], [82], [90] and [94], as follows:

[49] *Insofar as Tey and Ooi are concerned, as they are not parties to the arbitration agreement, s. 10 of the AA does not come into play. The court's power to grant a stay is derived from its inherent power to stay court proceedings pending arbitration in the interests of the justice of the case. Therefore, the sole issue for consideration is whether the discretion ought to be exercised to allow a stay as sought by Tey and Ooi or to refuse such a stay as submitted by Protasco. At this appellate stage, the question before us is whether the learned judge exercised his discretion correctly in determining that a stay pending arbitration should be granted in respect of Protasco's claims against Tey and Oo*i. C D

...

[51] *In deciding on these options, it is necessary to take into consideration and weigh up several competing factors relating to both the arbitration and the court proceedings, including*: E

(i) *The overlap in parties in the proceedings and the arbitration …*;

(ii) *The overlap of the issues that will be raised in the arbitration ….*; F

(iii) *The cause of action in breach of contract will also, to a considerable extent, touch on the facts relating to the parts played in this venture by Tey, Ooi and Dato' Chong as well as both parties' agents and/or nominees. To that extent there is considerable overlap in the factual matrix giving rise to the breach of contract and the conspiracy to injure/defraud*;

(iv) *The principal witnesses for the primary parties in the arbitration* namely Protasco and PT ASU *may be the same actors,* namely Tey, Ooi, and Dato' Chong …. G

(v) *The reliefs sought also bear some similarity* save for the quantum claimed, ...

... H

[82] *This court is empowered in the exercise of its inherent jurisdiction to determine which set of proceedings ought to proceed first (or in parallel) in order to achieve the most-just result for the parties ….*

... I

A [90] *However, as against this, it does not mean that just because Protasco's claim against PT ASU is stayed, it necessarily follows that the rest of the dispute against Tey and Ooi must necessarily be stayed as a matter of course. As reasoned in Tomolugen, which reasoning we respectfully adopt, the court is bound to strike a balance between the following considerations*:

B (a) *The plaintiff's right to choose whom it wants to sue and where*;

(b) *The court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause*;

(c) *The court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes; and*

C (d) *The balance that is achieved should be just in all the circumstances of the case*.

...

[94] *We are therefore constrained to reverse the finding of the learned judge of the High Court. His Lordship erred in failing to give any or any reasoned consideration*
D *to the relevant principles governing the grant of a stay of proceedings pending arbitration against non-parties, nor the myriad factors to be taken into consideration, applied and weighed so as to achieve a just result*. (emphasis added)

[66] In *LNH Landscaping Sdn Bhd v. TKH Construction Sdn Bhd & Other Appeals* [2021] 1 LNS 581; [2021] AMEJ 615, at [38], the High Court has
E applied *Protasco* as follows:

[38] *I am of the following view:*

(1) *in deciding a Stay/No Stay (Suit), the court should prevent an injustice or an abuse of court process as provided in O. 92 r. 4 RC. Such an approach (in the interest of justice) is in consonance with Prostaco (which has been*
F *affirmed by our Federal Court in Jaya Sudhir) as well as cases from Singapore (Tomolugen Holdings) and HK (Linfield)*;

(2) *in the determination of a Stay/No Stay (Suit), all relevant factors should be considered together by the court (Balancing Exercise) - Prostaco. In the Balancing Exercise*:

G (a) *the overriding consideration is justice and prevention of abuse of court process*;

(b) *the factors to be considered by the court are not exhaustive - please refer to the judgment of VK Rajah JA in Singapore's Court of Appeal in Tjong Very Sumito & Ors v. Antig Investments Pte Ltd [2009] 4 SLR*
H *732, at [52]. However, the court should not consider the merits of the suit and arbitration in question - Tjong Very Sumito, at [53];*

(c) *the court may attach any weight to any factor as the court deems fit; and*

(d) *the court may accept certain factors in preference to other matters; and*

I

(3) *the exercise of judicial discretion regarding a Stay/No Stay (Suit) depends on the particular facts of each case – Protasco, at [75]. Accordingly, from the view point of the stare decisis doctrine, judgments regarding Stay/No Stay (Suit), are based on their own factual matrices and have no binding effect*.

(emphasis added)

[67] Premised on *Protasco* and *LNH Landscaping*, we unhesitatingly affirmed Wong J's exercise of discretion under O. 92 r. 4 of the RC, the court's inherent jurisdiction and/or inherent power (which accepted the second option). Our reasons are as follows:

(i) public interest is paramount and outweighs any private interest of parties.

We reproduce below the preamble to LDA and s. 3 of the LDA:

Preamble

An Act to provide for the establishment of a Federal development authority and local development boards to promote and carry out projects for land development and settlement, for making funds available therefor, and for purposes connected therewith.

s. 3 *Establishment, duties and powers of [FELDA]*

(1) *There shall be established for the purposes of this Act a body, to be known as [FELDA]*.

(2) *[FELDA] shall have the following duties*:

(a) *to undertake and carry out land development projects*;

(b) *to promote and assist in the investigation, formulation and implementation of projects for development, settlement and management of land in the Federation*;

(c) *to promote, stimulate, facilitate and undertake economic, social, residential, agricultural, industrial and commercial development and management and other ancillary activities and services in any area for which [FELDA] has been vested with the power to carry out land development projects or any other area which has been acquired, purchased, leased by or alienated to or is otherwise held or enjoyed by the Authority or its corporations or companies for the performance of its functions*;

(d) *to undertake and carry out such activities as may assist in the modernization of the agricultural sector in the area mentioned under paragraph (c); and in particular activities relating to the production, utilization, processing and marketing of crops, livestock and fresh water fisheries*;

(e) *to assist, guide, advise, manage, administer and coordinate economic, social, residential, agricultural, industrial and commercial activities whether within or outside the area mentioned under paragraph (c).*

A (3) *[FELDA] shall have power, for the purpose of the discharge of its duties under subsection (2)*:

(a) to carry on all activities the carrying on whereof appears to it to be requisite, advantageous or convenient for or in connection with the discharge of its said duties including the provision of
B infrastructure and social amenities and other ancillary services;

(b) to promote and co-ordinate the carrying on of any such activities by boards, corporations, companies and other bodies or persons and to give assistance to such boards, corporations, companies and other bodies or persons including financial
C assistance, by way of grant, loan or otherwise;

(c) *with the approval of the Minister to enter into a* partnership, *joint venture, undertaking, co-operation in any manner, an arrangement for the sharing of profits or to carry on such activities in association or otherwise, with any person*, public authority, corporation, company or other body (including the Government of the Federation or any State
D Government) *carrying on or engaging in any such activities* and to take or otherwise acquire shares and securities of any such public authority, corporation, company or other body, and to sell, hold on, reissue with or without guarantee, such shares and securities or otherwise dispose of or deal with them;

E (ca) with the approval of the Minister, to establish or promote the establishment of companies to carry on or engage in any activity which has been planned or undertaken by the Authority (including the taking over of the function of a corporation which has been wound up and dissolved under section 43);

F (d) to make loans, subject to such conditions as the Authority may think fit, in accordance with this Act;

(e) to do anything and to enter into any transaction (whether or not involving expenditure, borrowing in accordance with this Act in that behalf, granting of loans or investment of money, the acquisition, use and disposal of any movable or immovable
G property, including rights) which in its opinion is calculated to facilitate the proper discharge of its functions or is incidental or conducive thereto. (emphasis added)

It is clear from the preamble to LDA and s. 3(2)(a) to (e) of the LDA that one of the objects of the LDA as intended by Parliament, is to assist
H FELDA settlers (object (LDA)). Indeed, the LDA is a socially benevolent legislation to promote and protect the interest of FELDA settlers.

If Suit 843 is stayed pending the disposal of the arbitration (SP/FIC), SP may rely on s. 41A(1)(a) and (b) of the AA to assert that proceedings
I in the arbitration (SP/FIC) and subsequent award of the arbitrator (arbitral award) cannot be disclosed to the public (confidentiality requirement (arbitration)). Section 41A of the AA provides as follows:

s. 41A *Disclosure of information relating to arbitral proceedings and awards prohibited*

(1) *Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to*:

(a) *the arbitral proceedings under the arbitration agreement; or*

(b) *an award made in those arbitral proceedings*.

(2) Nothing in subsection (1) shall prevent the publication, disclosure or communication of information referred to in that subsection by a party:

(a) if the publication, disclosure or communication is made:

(i) to protect or pursue a legal right or interest of the party; or

(ii) to enforce or challenge the award referred to in that subsection, in legal proceedings before a court or other judicial authority in or outside Malaysia;

(b) if the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or

(c) if the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.

(emphasis added)

In this instance, FELDA and FIC have raised, among others, the following five questions:

(i) illegality issue (DA);

(ii) illegality issue (instrument/contracts);

(iii) issue (first tort of conspiracy);

(iv) issue (second tort of conspiracy); and

(v) issue (breach of 12 individuals' fiduciary duties)

(five issues).

If Wong J has accepted the first option to stay Suit 843 pending the outcome of the arbitration (SP/FIC), all evidence regarding the five issues and arbitral award will be subject to the confidentiality requirement (arbitration) and cannot be disclosed to the public.

We are firmly of the view that, it is in the public interest for the five issues to be tried in open court in the glare of public scrutiny so as to ensure that the object (LDA) has not been circumvented in this instance

(public interest (transparency)). Furthermore, in accordance with public interest (transparency), SP Group cannot be allowed to hide behind the confidentiality requirement (arbitration) because the public, especially FELDA settlers, are entitled to know the true reasons for, among others, the execution of the DA, PA, two SPAs (Lots 390 and 29778) and MOU;

(ii) public interest requires, if not demands, the five issues to be tried expeditiously in Suit 843 (public interest (expeditious court trial)). If there is any wrongdoing by any party in this instance which defeats the object (LDA) and which affects adversely the interest of FELDA and FELDA settlers, it is in the public interest for the court in Suit 843 to remedy speedily such a wrongdoing;

(iii) in the court's "balancing exercise" (as explained in *Protasco* and *LNH Landscaping*) to decide which one of the two options to be adopted, public interest (transparency) and public interest (expeditious court trial) far outweigh all the private interests of SP Group (SP Group's private interests);

(iv) this court cannot envisage any injustice which may be occasioned to SP Group's private interests due to the exercise of Wong J's discretion to accept the second option. This is because SP Group has every right to oppose Suit 843 to the hilt. Furthermore, SP Group has an option to counterclaim against FELDA and FIC in Suit 843. It is therefore clear that SP Group's private interests is not adversely affected in any manner by the High Court's adoption of the second option; and

(v) as explained in the above para. 61, the arbitration (SP/FIC) constitutes an abuse of arbitral process; and

(vi) FELDA and FIC have a right to sue SP Group, 12 individuals, partners (Messrs YYA) and PTG. This right cannot be curtailed by SP Group's private interests.

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[68] Premised on the evidence and reasons stated in the above parts H(1) to H(6), we affirm Wong J's decision (encl. 23). Additionally, Wong J's decision (encl. 23) involved an exercise of judicial discretion by the court of first instance. Sitting in an appellate capacity, we do not find any appealable error which warrants a reversal of Wong J's decision (encl. 23) – please refer to the Federal Court's judgment delivered by Mohd Dzaiddin FCJ (as he then was) in *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors* [1995] 3 CLJ 493; [1995] 2 MLJ 709, at 722.

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[69] We reproduce below ss. 50 and 51 of the Specific Relief Act 1950 (SRA) as well as O. 29 r. 1(1) of the RC:

> s. 50 *SRA Preventive relief how granted*
>
> *Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.*
>
> s. 51 *Temporary and perpetual injunctions*
>
> (1) *Temporary injunctions are such as are to continue until a specified time, or until the further order of the court. They may be granted at any period of a suit, and are regulated by the law relating to civil procedure.*
>
> (2) *A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.*
>
> O. 29 r. 1 RC *Application for injunction*
>
> (1) *An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter*, whether or not a claim for the injunction was included in that party's originating process, counterclaim or third party notice, as the case may be.
>
> (emphasis added)

[70] According to Wong J's decision (encl. 61), at [41], [43], [44] and [57] to [59]:

> [41] *I am of the view that, as regards a non-party, the court would exercise its discretion to grant an interim anti-arbitration injunction sought by a non-party if*:
>
> (a) *there are serious issues to be tried*;
>
> (b) *the balance of convenience lies in favour of granting the injunction; and*
>
> (c) *damages would not be an adequate remedy*.
>
> (See *Jaya Sudhir a/l Jayaram v. Nautical Supreme Sdn Bhd & Ors* [2019] 7 CLJ 395; [2019] 5 MLJ 1; *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193).
>
> ...
>
> [43] *I am of the view that FELDA has met the threshold of showing that there are serious issues to be tried in this case. These issues are as follows*:
>
> (a) *whether the [DA] contravenes s. 3(3)(c) [LDA] and therefore is null and void/or unenforceable?*
>
> (b) *if the [DA] is null and void ab initio due to the contravention of s. 3(3)(c) [LDA], whether the [PA], lease agreement, SPAs, MOTs and DoAL are also null and void ab initio?*

A (c) *if the [DA] is null and void ab initio, whether the arbitration clause therein is valid and enforceable?*

(d) *whether the conspirators conspired to cause FELDA and FIC to execute the letter of award, [DA], [PA], the lease agreement, the SPAs, the MOTs, DoAL and MOU ('disputed agreements & instruments') and if so, whether this*
B *renders the disputed agreements & instruments null, void and/or unenforceable?*

(e) *whether the SPAs dated 2 December 2015 and 7 November 2016 in respect of Lot 390 and Lot 29788 and their consequent transfer via the MOTs are unenforceable, null and void and defeasible ab initio by reasons of fraud, void*
C *or insufficient instrument or that the titles of Lot 390 and Lot 29788 were unlawfully acquired by SPSB and SPKLVC in contravention of the LDA or the power of attorney read with the development agreement?*

(f) *whether there is a total failure of consideration on the part of SPSB and SPKLVC under the SPAs and MOTs and therefore, they are unenforceable, null and void and liable to be set aside ab initio?*
D

(g) *whether the MOU was executed to cover up the first conspiracy perpetrated by the conspirators and therefore, is unenforceable, null and void and liable to be set aside ab initio?*

(h) *whether FELDA's previous board, FELDA's previous management, FIC's previous board and FIC's previous management have breached their fiduciary*
E *duties towards FELDA and FIC? and*

(i) *whether [SP Group] and their solicitors, Messrs YYA dishonestly assisted FELDA's previous board, FELDA's previous management, FIC's previous board and FIC's previous management to breach their fiduciary duties towards FELDA and FIC?*

F [44] *On the balance of convenience, FELDA has raised various cogent reasons in support of its application.*

...

[57] *I have already dealt with the issue of FELDA's proprietary rights to its land.*
G *There is merit in the contention that damages will not be an adequate remedy as the arbitration proceedings will affect FELDA's proprietary rights in the FELDA Semarak lands and it will also affect FELDA's right to be heard although FELDA can also choose to be a witness in the arbitration proceedings.*

[58] *However, I do agree that SPSB has not shown that it is in the position to pay*
H *any substantial damages to FELDA and FIC. SPSB has not filed its audited accounts for the financial year from 1 January 2017 onwards. SPSB's audited accounts for the financial year ended 31 December 2016 show that they do not have any revenue and only have a reserve of RM10,797,995 whereas the FELDA Semarak lands have a total commercial value of up to RM1.062 billion. So I agree with the plaintiffs' submission that they have shown that damages would not be an*
I *adequate remedy since SPSB has not demonstrated its ability to pay damages.*

[59] *Taking into consideration all the relevant factors I am of the view that it would be just and convenient and the fairest approach to all parties to grant the injunction prayed for by the plaintiffs. Enclosure 61 is accordingly allowed with costs.*

(emphasis added)

[71] Firstly, Wong J has applied the right tests and taken into account all the relevant considerations in granting an interim injunction under ss. 50 and 51(1) of the SRA read with O. 29 r. 1(1) of the RC to restrain, among others, SP, from proceeding with the arbitration (SP/FIC).

[72] Secondly, Wong J's decision (encl. 61) is supported by the following reasons:

(i) as explained in the above paras. 50 to 53, premised on the business common sense interpretation (commercial contract) and the *contra proferentem* rule of construction, SP has no right to arbitrate pursuant to art. 9.04 (upon the filing of Suit 477);

(ii) SP's right to arbitrate under art. 9.04 has been waived by SP – please refer to the above paras. 57 to 60;

(iii) according to the above para. 61, the arbitration (SP/FIC) constitutes an abuse of arbitral process; and

(iv) Wong J's decision (encl. 61) is in consonance with public interest (transparency) and public interest (expeditious court trial) – please see the above sub-paras. 67(1) and (2).

[73] Lastly, Wong J's decision (encl. 61) concerned an exercise of discretion by the court of first instance. As an appellate court, we cannot find any reason for us to intervene regarding Wong J's decision (encl. 61).

Appeal 1265

[74] We reproduce below ss. 41, 52(1) of the SRA and O. 15 r. 16 of the RC:

s. 41 SRA *Discretion of court as to declaration of status or right*

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

s. 52. *Perpetual injunctions when granted*

(1) *Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.*

O. 15 r. 16 RC *Declaratory judgment*

No action or other proceeding shall be open to objection merely on the ground that a declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

(emphasis added)

Prayer 1 (Suit 5) And Prayer 2 (Suit 5)

[75] Prayer 1 (Suit 5) and prayer 2 (Suit 5) concern issues which are still pending in Suit 843. Prayer 1 (Suit 5) and prayer 2 (Suit 5) can only be decided by the High Court in Suit 843 after a trial. Accordingly, we make no order regarding prayer 1 (Suit 5) and prayer 2 (Suit 5) in Appeal 1265.

Prayer 3 (Suit 5) And Prayer 4 (Suit 5)

[76] As explained in the above paras. 57 to 60, SP's right to arbitrate under art. 9.04 had been waived by SP. With regard to SP's waiver (art. 9.04), we are of the view that there is a plain error on the part of the court of first instance which warrants appellate intervention. Hence, this court exercises its discretion under s. 41 of the SRA read with O. 15 r. 16 of the RC to grant prayer 3 (Suit 5).

[77] In view of the above para. 61, the arbitration (SP/FIC) constitutes an abuse of arbitral process. With respect, the High Court should have granted prayer 4 (Suit 5). We therefore exercise our discretion to grant a declaration as applied for in prayer 4 (Suit 5).

Prayer 5 (Suit 5)

[78] In Suit 5, FIC has applied for, among others, a "permanent" injunction to restrain SP, SP's directors, agents, servants and nominees from continuing with the arbitration (SP/FIC). It is to be noted that ss. 50, 51(2) and 52(1) of the SRA have used the term "perpetual" injunction.

[79] We are of the respectful view that Anand JC should have granted a perpetual injunction in this case. Our reasons are as follows:

(i) the first legal error (Anand JC's decision) and second legal error (Anand JC's decision) have been made with regard to the interpretation of cl. 9.04 – please refer to the above paras. 49 to 53. A perpetual injunction should be granted under s. 52(1) of the SRA to restrain SP from breaching art. 9.04 (when SP commenced and proceeded with arbitration (SP/FIC) despite having previously filed Suit 477);

(ii) as explained in the above paras. 57 to 60, there was a plain error by the High Court in respect of SP's waiver (art. 9.04);

(iii) the arbitration (SP/FIC) constitutes an abuse of arbitral process – please see the above para. 61; and

(iv) the above evidence and reasons compel us to grant prayer 5 (Suit 5).

Outcome Of Three Appeals

[80] Premised on the above evidence and reasons:

(i) Appeal No. 511 is dismissed with costs of RM10,000 (subject to allocatur fee) and Wong Chee Lin J's decision (encl. 23) is consequently affirmed;

(ii) Appeal No. 519 is dismissed with costs of RM10,000 (subject to allocatur fee) and Wong Chee Lin J's decision (encl. 61) is upheld; and

(iii) Appeal No. 1265 is allowed in part with the following orders:

(a) prayer 3 (Suit 5), prayer 4 (Suit 5) and prayer 5 (Suit 5) (as referred to in the above paragraph 25) are granted;

(b) Anand JC's decision is set aside; and

(c) subject to allocatur fee, costs of RM20,000 shall be paid by SP to FIC.

[81] In closing, it is clearly in the public interest for Suit 843 to be completed expeditiously.